



::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE.



द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No.
V2/151/BVR/2017

मूल आदेश सं /
O.I.O. No.
BHV-EXCUS-000-JC-075-16-17

दिनांक /
Date
16.03.2017

ख अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-053-2018-19

आदेश का दिनांक /
Date of Order: 20.04.2018

जारी करने की तारीख /
Date of issue: 27.04.2018

Passed by **Dr. Balbir Singh, Additional Director General (Taxpayer Services), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, डॉ. बलबीर सिंह, अपर महानिदेशक करदाता सेवाएँ, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा ८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Dr. Balbir Singh, Additional Director General of Taxpayer Services, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent :-**
M/s Nileshbhai Narandas Tilavat, Prop. Of Zen Construction, 7, Lakhani Complex, Main Bazar Road, Rajula 365 560

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- ३८००१६ को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

- (iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रूपए 5 लाख या उससे कम, 5 लाख रूपए या 50 लाख रूपए तक अथवा 50 लाख रूपए से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रूपए का निर्धारित शुल्क जमा करना होगा। /

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

- (B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रूपए 5 लाख या उससे कम, 5 लाख रूपए या 50 लाख रूपए तक अथवा 50 लाख रूपए से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रूपए का निर्धारित शुल्क जमा करना होगा। /

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियों संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनवेट जमा की ली गई गलत राशि
- (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा। /

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :****Revision application to Government of India:**

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। /
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
- (ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। /
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-5 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

ORDER IN APPEAL

Shri Nileshbhai Narandas Tilavat, Proprietor of M/s. Zen Construction, 7, Lakhani Complex, Main Bazaar Road, Rajula – 365 560 (hereinafter referred to as “the appellant”) has filed this appeal against the OIO No. BHV-EXCUS-000-JC-75-2016-17 dated 16.03.2017 (hereinafter referred to as “the impugned order”) passed by the Joint Commissioner, Central Excise & Service Tax, Bhavnagar (hereinafter referred to as “the adjudicating authority”).

2.1 Briefly stated, the facts are that on scrutiny of the documents/details, submitted by the appellant for the F.Y. 2011-12 to 2015-16 in compliance to the summons issued by the department, it was observed that the appellant had provided services related to construction and erection of Labour Colony, Staff Quarters, Mess Store Rooms, Laboratories, Site Office etc. at the project site of big companies out of Prefabricated Cement Panel Boards, Steel, Tiles, and Other Materials, which also included finishing, painting, electrical, sanitary & drainage works. For this purpose, some of the companies awarded work orders/agreements to the appellant at the rate which included supply of materials to be used in providing such services. Whereas, some companies awarded separate orders for supply of materials and supply of services. Some work orders were related to dismantling the structure constructed out of Prefabricated Cement Panel Board at one site and re-erection of such structure at another site, which involved labour work only. Some of the service recipients had also awarded separate work orders for hiring of machinery like J.C.B. to be used for construction /erection of labour camp out of Prefabricated Cement Panel Board.

2.2 It was also observed that the aforesaid services were taxable under the category of “Commercial and Industrial Construction Service” as well as “Work Contract Service”, till 30.06.2012, and thereafter appeared to be “Taxable Services” under the provisions of Finance Act, 1994. Accordingly, the appellant was liable for payment of Service Tax on the services provided by them. However, the appellant had not paid any amount of Service Tax thereon.

2.3 Two statements of Shri Nileshbhai N. Tilavat, Proprietor of the appellant firm were also recorded wherein he submitted some of the requisite documents and explained the details shown therein.

2.4 Accordingly, a Show Cause Notice dated 19.10.2016 was issued to the appellant proposing for demanding Service Tax totally amounting to Rs.82,73,299/- along with interest and further proposed penalties from the appellant under Section 77(1)(a), Section 70, and Section 78(1) of Finance Act, 1994.

3. The Adjudicating authority, vide the aforesaid impugned order, confirmed the demand of Service Tax totally amounting to Rs.82,12,939/- along with interest and imposed penalties of Rs.10,000/-, Rs.10,000/-, Rs.82,12,939/- under Section 77(1)(a), Section 70, and Section 78(1) of Finance Act, 1994, respectively. However, the adjudicating authority has dropped the demand of Krishi Kalyan Cess of Rs.60,360/-, as Krishi Kalyan Cess was effective only w.e.f. 01.06.2016 while the captioned SCN covered the period from April, 2011 to March, 2016.

4. Feeling aggrieved, the appellant filed the present appeal on the following grounds:-

- All these contracts were given to the appellant at a price which included cost towards material consumed in providing the services by the appellant. These services should be classified as “Work Contract Service” and appropriate rate of abatement should have been applied to arrive at the service tax liability under the provisions of Rule 3(1) of the Composition Rules, 2007 and Notification No. 24/2012 dated 06.06.2012 (Service Tax (Determination of Value) Second Amendment Rules, 2012);
- Some services were provided as a sub-contractor to M/s. L&T Ltd. (Contractor) which were consumed by the SEZ Units namely M/s. Torrent Power Ltd. & M/s. Tata



Consultancy Services Limited in the SEZ territory which were exempt as per Notification No. 40/2012 dated 20.06.2012 read with entry No. 29(h) of the Notification No. 25/2012-S.T. dated 20.06.2012;

- Fabrication services rendered as a sub-contractor to M/s. L&T Ltd. (Contractor) for the project of Mahatma Mandir Project (a project of Gujarat State Government) were exempted vide Entry No. 12(a) as well as Entry No. 29(h) of Mega Exemption Notification No. 25/2012-S.T. dated 20.06.2012;
- Services rendered as a sub-contractor to M/s. Ramky Infrastructure Ltd. (Contractor) for the project at Dr. Babasaheb Ambedkar Open University, Ahmedabad, which, being non-commercial in nature, was exempted vide Circular No. 80/10/2004 dated 17.09.2004;
- The appellant was liable to pay at the rate of 50% of the service tax liability under partial reverse charge mechanism on the services rendered to M/s. L&T Ltd., M/s Shapoorji Pallonji & Co.Ltd., and M/s. Roop Telesonic Ultra Sonix Ltd. under the provisions of Notification No. 30/2012-St dated 20.06.2012 (w.e.f. 01.07.2012);
- The Work sheet prepared by the department included duplicate entries bearing the same work order number and the same amount;
- In absence of mens-rea, no penalty could be imposed. Further penalty could not be imposed under Section 78 of Finance Act, 1994 without any wilful suppression of facts with the intention to evade payment of service tax. Also, the issue was arising out of interpretation of the provisions of law, hence, penalty was not imposable. In this regard, the appellant relied upon various judicial pronouncements of higher appellate forum.

5. The appeal was filed before the Commissioner (Appeals), Rajkot. The undersigned has been nominated as Commissioner (Appeals) / Appellate Authority as regards to the case of appellant vide Board's Order No. 05/2017-Service Tax dated 16.11.2017 issued by the Under Secretary (Service Tax), G.O.I, M.O.F, Deptt of Revenue, CBEC, Service Tax Wing on the basis of Board's Circular No. 208/6/2017-Service Tax dated 17.10.2017.

6. Personal hearing was granted to the appellant on 15.02.2018, wherein Shri Nileshbhai N. Tilavat Proprietor of the appellant firm appeared and reiterated the same as mentioned in his appeal memorandum. The appellant also submitted, vide letter dated 04.04.2018, a worksheet showing the calculation of Service Tax payable as per the department and a revised worksheet showing the calculation of Service Tax payable on the basis of the arguments made by the appellant as discussed hereinabove.

7. I have carefully gone through the facts of case, the grounds mentioned in the appeal and the submissions made by the appellant. The questions to be decided in the appeal are as to whether:-

- (i) The activity carried out by the appellant is classifiable under "Work Contract Service" (till 30.06.2012) or "Taxable Service" (w.e.f. 01.07.2012);
- (ii) The appellant is eligible for abatement under Works Contract Service;
- (iii) The appellant is eligible for the benefit of partial reverse charge mechanism under Works Contract Service, as provided under Notification No. 30/2012-ST dated 20.06.2012
- (iv) The appellant is eligible for exemption as provided under Entry No. 29(h) of Notification No. 25/2012-ST dated 20.06.2012;
- (v) The appellant is eligible for exemption as provided under Notification No. 40/2012 dated 20.06.2012 (SEZ), and under Entry No. 12(a) of Notification No. 25/2012-ST dated 20.06.2012 (Mahatma Mandir & University); and

- (vi) Penalties under can be imposed upon the appellant under Section 77(1)(a), Section 70, and Section 78((1) of Finance Act, 1994.

8.1 I find that the appellant, vide letter dated 04.04.2018, has submitted a worksheet showing the calculation of Service Tax payable as per the department. On going through the calculation sheet, I find that there are 162 entries involving Service Tax totally amounting to Rs.82,73,299/-. They have also submitted a revised worksheet showing the calculation of Service Tax payable on the basis of the arguments made by the appellant as discussed hereinabove, wherein they have shown 162 entries involving Service Tax totally amounting to Rs.39,08,624/-.

8.2 On comparing both the said worksheets, I find that in respect of 59 entries (Sr. No.1, 2, 3, 5, 8, 9, 10, 11, 27, 28, 29, 31, 41, 42, 46, 47, 61, 62, 63, 64, 65, 66, 67, 74, 76, 79, 80, 82, 85, 86, 87, 88, 91, 92, 93, 94, 95, 96, 97, 98, 100, 102, 103, 104, 105, 106, 107, 108, 110, 111, 113, 116, 118, 121, 127, 128, 129, 130, 131), the appellant has calculated the amount of Service Tax more than that calculated by the department. Hence, since the amount of service tax, calculated by the department is less than the amount of service tax, calculated by the appellant, I find that there would be no dispute by the appellant on the lesser amount of service tax, demanded by the department. Accordingly, I do not discuss in respect of these entries in my findings.

9.1 I also find that the appellant has argued in respect of the some of the remaining entries that some services were provided as a sub-contractor to M/s. L&T Ltd. which were consumed by the SEZ Units namely M/s. Torrent Power Ltd. & M/s. Tata Consultancy Services Limited in the SEZ territory which were exempt as per Notification No. 40/2012 dated 20.06.2012 read with entry No. 29(h) of the Notification No. 25/2012-S.T. dated 20.06.2012. In this regard, I find that said Notification No. 40/2012 dated 20.06.2012 exempts the services received by a SEZ Unit and used for the authorised operations, from the whole of the service tax leviable thereon. However, the exemption contained in this notification shall be subject to the following conditions, namely:-

(a) *“the exemption shall be provided by way of refund of service tax paid on the specified services received by a unit located in a SEZ or the developer of SEZ and used for the authorised operations:*

Provided that where the specified services received in SEZ and used for the authorised operations are wholly consumed within the SEZ, the person liable to pay service tax has the option not to pay the service tax ab initio instead of the SEZ unit or the developer claiming exemption by way of refund in terms of this notification.

Explanation.- For the purposes of this notification, the expression “wholly consumed” refers to such specified services received by the unit of a SEZ or the developer and used for the authorised operations, where the place of provision determinable in accordance with the Place of Provision of Services Rules, 2012(hereinafter referred as the POP Rules) is as under:-

- (i) *in respect of services specified in rule 4 of the POP Rules, the place where the services are actually performed is within the SEZ ; or*
- (ii) *in respect of services specified in rule 5 of the POP Rules, the place where the property is located or intended to be located is within the SEZ; or*
- (iii) *in respect of services other than those falling under clauses (i) and (ii), the recipient does not own or carry on any business other than the operations in SEZ;*

(b) *..... and*

(c) *for the purpose of claiming exemption, the Unit of a SEZ or developer shall obtain a list of services that are liable to service tax as are required for the authorised operations approved by the Approval Committee (hereinafter referred to as the specified services) of the concerned SEZ;*



(d) for the purpose of claiming ab initio exemption, the unit of a SEZ or developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, in addition to the list specified under condition (c); the unit of a SEZ or developer who does not own or carry on any business other than the operations in SEZ, shall declare to that effect in Form A-1;

(e) the unit of a SEZ or developer claiming the exemption shall declare that the specified services on which exemption and/ or refund is claimed, have been used for the authorised operations;”

9.2 In view of the above, I find that to avail the benefit of exemption notification, ibid, the appellant should have followed the following procedures:-

- (i) The services should be used by the SEZ for the authorised operations, and The appellant should submit a list of services that are required for the authorised operations approved by the Approval Committee for availing the benefit of exemption under said Notification; and
- (ii) The services should be wholly consumed within the SEZ i.e. the SEZ unit does not own or carry on any business other than the operations in SEZ.

9.3 However, I find that the appellant has failed to follow the aforesaid prescribed procedures. Accordingly, the benefit of exemption under said Notification cannot be given to the appellant. Moreover, on going through both the work orders, I find that the appellant was awarded work orders No.E5074WOD2000220 dated 20.10.2012 & No. E4826WOD3000027 dated 25.02.2013 as a sub-contractor from the contractor namely M/s. L&T Ltd. The relevant details of both the aforesaid work orders are as under:-

	Description shown in Work Order No. E5074WOD2000220 dated 20.10.2012	Description shown in Work Order No. E4826WOD3000027 dated 25.02.2013
W/O Type	Regular Labour without materials	Regular Labour without materials
Item Details	Charges towards Dismantling and Reconstruction as per statutory requirements. Labour Charges for dismantling and re-erection of sintex shed.	Dismantling site office and site leveling charges for dismantling of L&T site office at TCS Garimapark with all tools & takles as directed by Engineer In-Charge

9.4 In view of the above, I find that both the aforesaid work orders are purely service agreements, and there is no transfer of property in goods involved in the execution of said contracts. Hence, both the said agreements cannot be classified under “Work Contract Service”. And, since the appellant had not provided “Work Contract Service” to M/s. L&T Ltd., the appellant is not entitled for the benefit of exemption as provided under Entry No. 29(h) of said Notification No. 25/2012-S.T. dated 20.06.2012.

9.5 Further, on going through the aforesaid work orders, I also find that the appellant has not provided any service to SEZ units, but provided services only to L&T Ltd. by way of erecting L&T’s site office and shed for L&T employees/labour, who were working for the project. It is no way connected with the SEZ Unit. Hence, the appellant is not eligible for the benefit of exemption Notification, as provided under Notification No. 40/2012 dated 20.06.2012.

10.1 I also find that the appellant has argued in respect of the some of the remaining entries that fabrication services rendered as a sub-contractor to M/s. L&T Ltd. (Contractor) for the project of Mahatma Mandir Project were exempted vide Entry No.12(a) & Entry No.29(h) of Notification No. 25/2012-S.T. dated 20.06.2012. In this regard, I find that Entry No.29(h) of said Notification No. 25/2012-S.T. dated 20.06.2012 envisages as under:-

“sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt”.

10.2 The above entry makes it clear that if the principal contractor is providing an exempted works contract service and if some part of the works contract is sub-contracted, then the sub-contractor would also be exempt from payment of service tax. However, if the contractor takes the services from architects, consulting engineers, erection, commissioning or installation agents etc., the services rendered by such person would not be exempt from service tax even though such services are rendered in relation to exempt works contract service. In this regard, the Board, vide Circular No.138/07/2011-ST dated 06.05.2011, clarified that when a principal contractor, while providing works contract services, obtained the service of various other service providers, such as architect, consulting engineer etc. These are separately classifiable services. Therefore, while the principal contractor would not be liable to pay service tax on the construction of roads, dams, etc. but the consulting engineer, architect etc. who are providing services of design, drawing, engineering etc. for the construction of such road would be liable to pay service tax as their services are separately classifiable and will not be covered under the works contract service.

10.3 In the present case, I find that the appellant was awarded work orders No.E8521WOD2000237 dated 16.10.2012 & No.E8632WOD2000222 dated 17.12.2012 as a sub-contractor from the contractor namely M/s. L&T Ltd. for Mahatma Mandir Project, and M/s. L&T Ltd. was awarded said work orders by the Gujarat State Government. The relevant details of both the aforesaid work orders are as under:-

	Description shown in Work Order No. E8521WOD2000237 dated 16.10.2012	Description shown in Work Order No.E8632WOD2000222 dated 17.12.2012
W/O Type	Service	Regular Labour without materials
Item Details	Erection of labour colony sheds	Labour Charges for making labour shed by GI Sheet

10.4 In view of the above, I find that both the aforesaid work orders are purely service agreements, and there is no transfer of property in goods involved in the execution of said contracts. Hence, both the said agreements cannot be classified under "Work Contract Service". And, since the appellant had not provided "Work Contract Service" to M/s. L&T Ltd., the appellant is not entitled for the benefit of exemption as provided under Entry No. 29(h) of said Notification No. 25/2012-S.T. dated 20.06.2012.

10.5 Further, I find that the appellant has not provided any service related to Mahatma Mandir Project, but provided services only to L&T Ltd. for erection of L&T's labour shed, who were working for the project. It is no way connected with the Mahatma Mandir Project. Hence, the appellant is not eligible for the benefit of exemption Notification, as provided under Entry No. 12(a) of said Notification No. 25/2012-S.T. dated 20.06.2012.

11.1 I also find that the appellant has argued in respect of the some of the remaining entries that they have rendered services as a sub-contractor to the contractor namely M/s. Ramky Infrastructure Ltd. for the project at Dr. Babasaheb Ambedkar Open University, Ahmedabad, which, being non-commercial in nature, is exempted vide Notification No. 25/2012 dated 20.06.2012, as clarified by the Board vide Circular No. 80/10/2004 dated 17.09.2004. Further, the university was established by the Act No. 14 of 1994 passed by the Gujarat State Legislature. However, I also find that the appellant, himself, has calculated Service Tax on the said services in the revised worksheet submitted by them vide letter dated 04.04.2018. In view of the above, I conclude that said service is not exempted. Hence, the appellant is not allowed for the benefit of Entry No. 29(h) of Notification No. 25/2012-ST dated 20.06.2012.

11.2 In this regard, I also find that the appellant was awarded work orders dated 13.01.2012 & dated 12.01.2012 as a sub-contractor from the contractor i.e. M/s. Ramky Infrastructure Ltd. for the project at Dr. Babasaheb Ambedkar Open University, Ahmedabad. The relevant details of both the aforesaid work orders are as under:-



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Description as per	Work Order dated 13.01.2012 issued by the main contractor & Invoice No. 02.02.2012 issued by the appellant	Work Order dated 12.01.2012 issued by the main contractor & Invoice No. 02.02.2012 issued by the appellant
Order	Pota Cabin	Prefabricated plinth for the processed portable
Invoice	Site Office	Prefabricated plinth for site office

11.3 In view of the above, I find that both the aforesaid work orders are purely service agreements, and there is no transfer of property in goods involved in the execution of said contracts. Further, on going through the definition of "Work Contract", as defined in Clause 44 of Section 65B of Finance Act, 1994, as discussed hereinabove, I also find that if any property in goods is transferred to the main contractor, Sales Tax/VAT should be leviable thereon, which is not reflected in both the invoices, in question. Hence, both the said agreements cannot be classified under "Work Contract Service". Accordingly, the appellant is not entitled for any abatement of said service.

11.5 Further, on going through the aforesaid work orders, I also find that the appellant has not provided any service related to education, but provided services only to Ramky Infrastructure Limited for erection of site office for the employees/labours of M/s. Ramky Infrastructure Limited, who were working for the project. It is no way connected with the education or with the government project. Hence, the appellant is not eligible for the benefit of exemption Notification, as provided under Notification No. 25/2012-S.T. dated 20.06.2012.

12.1 In respect of remaining entries of the worksheet, I find that the appellant, as a sub-contractor, had provided services related to construction and erection of Labour Colony, Staff Quarters, Mess Store Rooms, Laboratories, Site Office etc. at the project site of big companies out of Prefabricated Cement Panel Boards, Steel, Tiles, and Other Materials, which also included finishing, painting, electrical, sanitary & drainage works. Accordingly, the relevant provisions related to "Work Contract Service", will have to be looked into for classification of the services provided by the appellant.

12.2 The "Work Contract", as defined in Clause 44 of Section 65B of Finance Act, 1994, means "a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property".

12.3 From the aforesaid definition, the following is transpired:-

- (i) There should be a transfer of property in goods involved in the execution of such contract;
- (ii) Such transfer of property in goods is leviable to tax as sale of goods (such as Sales Tax, VAT or WCT, etc.); and
- (iii) Such contract is for the purpose of carrying out Construction, Erection, Commissioning, Installation, Completion, Fitting-out, Repair, Maintenance, Renovation, & Alteration.

12.4 Hence, it can be safely concluded that work contract should be a composite/single contract for providing transfer of property in goods and provision of service, and VAT/Sales Tax should be leviable on such transfer of property in goods, for classification under the taxable category of "Work Contract Service".

12.5 In this regard, I have also carefully gone through the Rule 2A of the Service Tax (Determination of Value) Rules, 2006 which gives guidelines for determining the value of service portion in the execution of works contract. As per Rule 2A(i) of the said rules, "The value of service portion in the execution of the works contract shall be equivalent to the gross amount

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charged for the works contract less value of property in goods transferred in the execution of the said works contract". In view of the above, it transpires that the value of property in goods transferred has to be identified with sufficient documentary evidence. However, where value cannot be determined as per Rule 2A(i) of the said rules, then Rule 2A(ii) of said rules provides the manner in which the service portion can be determined which provides that "in case of works contracts entered into for execution of original works, service tax shall be payable on 40% of the total amount charged for the works contract".

12.6 On going through the work orders & invoices, submitted by the appellant with the appeal memorandum, and on going through both the statements of the appellant, it transpires that:-

- (i) Some of the companies awarded work orders/agreements to the appellant at the rate which included supply of materials to be used in providing such services.
- (ii) Some companies awarded separate orders for supply of materials and supply of services.
- (iii) Some Work Orders were related to dismantling the structure constructed out of Prefabricated Cement Panel Board at one site and re-erection of such structure at another site, which involved labour works only.

12.7 In respect of Sr.No. (ii) & (iii) above, I find that since the companies awarded separate orders for supply of materials and for supply of services, the contract cannot be considered as a composite/single contract. Accordingly, it cannot be classified under "Work Contract Service". Similarly, in case where work orders were related to dismantling the structure constructed out of Prefabricated Cement Panel Board at one site and re-erection of such structure at another site, which involved labour works only. Said services can not fall under said taxable category of "Work Contract Service." Further, in case the contract is without materials (even if there is separate contract for supply of materials and separate contract for labour), applicable service tax to be paid by the service provider only and there will not be any liability on Service Receiver under partial reverse charge mechanism, as provided under Notification No.30/2012-ST dated 20.06.2012 (Not being "Works Contract Service).


12.8 Regarding the work orders/agreements wherein the appellant had claimed that the supplies have also been made while providing services, and hence the benefit of abatement and partial reverse charge mechanism (w.e.f. 01.07.2012) should be allowed to them, I find that in majority of cases, the type of work is shown in the work orders as "Regular labour without materials". In some cases, "NO" is mentioned in a column "Material included". However, on going through the item details as shown in said work orders, I find that some of these item details show use of material while providing the service by the appellant. In view of the above, I find that prima facie, such type of services, where the appellant was awarded composite contract at the rate which included supply of materials to be used in providing such services, would fall under "Work Contract Service". Accordingly, the benefit of abatement of 40% of "Work Contract Service" as well as the benefit of partial reverse charge mechanism, as provided under Notification No. 30/2012-ST dated 20.06.2012 (w.e.f. 01.07.2012) would be available to the appellant.

12.9 However, I also find that the appellant has not submitted complete set of documentary evidences viz. full agreement/work order with terms & conditions and all the copies of invoices/RA Bills along with working, issued by the appellant so as to examine that they had included the value of all the supplies (either purchased by himself or procured from the service receiver during the execution of the work orders) consumed during the respective work orders. Further, on comparing the worksheets with the documents (viz. Work Orders & Invoices), submitted by the appellant with the appeal memorandum, I also find that in some cases, no

documentary evidence viz. Work order/Contract/Agreement etc. & Invoices etc. is available in this office file.

13 I find that these documentary evidences are very much crucial for deciding classification, abatement and the liability of payment of service tax by the appellant under partial reverse charge mechanism. **Accordingly, I remand the case back to the adjudicating authority for re-adjudicating of the case in light of my aforesaid findings.**

14. The appeal filed by the appellant stands disposed off in above terms.


(Dr. Balbir Singh)
Additional Director General (DGTS),
AZU, Ahmedabad
Date: 20/03/2018

F.No. V2/151/BVR/2017

BY RPAD.

To,
Shri Nileshbhai Narandas Tilavat,
Proprietor of M/s. Zen Construction,
7, Lakhani Complex, Main Bazaar Road, Rajula – 365 560

Copy to :

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone;
2. The Commissioner, CGST & Central Excise, Bhavnagar;
3. The Commissioner (Appeals), Rajkot;
4. The Jurisdictional Deputy / Assistant Commissioner, Commissionerate-Bhavnagar;
5. The Additional / Joint Commissioner, Systems, CGST, Rajkot;
6. Guard File.